(13)

No. 92-344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICI CURIAE AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE

INTEREST OF AMICI

The American Jewish Committee ("AJC") is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. Since all American Jews are either immigrants or descendants of

immigrants, if not refugees or descendants of refugees, AJC has always supported generous interpretations of immigration and refugee laws and policies. AJC, therefore, through the years has joined with other *amici curiae* in numerous cases involving such issues before the courts. The case at bar, on behalf of interdicted Haitians who are innocent victims of tragic circumstances, affords us an opportunity to do so once again.

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion, or ethnic origins.

As an organization rooted in the Jewish community, ADL is particularly sensitive both to political oppression and to the plight of refugees desperately seeking safe haven. ADL's involvement in this case is consistent with the mandate of its charter "to seek justice and fair treatment for all."*

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* *Amici* gratefully acknowledge the generous and insightful assistance of Norman L. Zucker and Naomi Flink Zucker, of the University of Rhode Island, in the preparation of this brief.

SUMMARY OF ARGUMENT

Amici submit this brief to assist the Court in placing the recent outflow from Haiti in historical context. The Haitian crisis is by no means the first time that the United States has had to respond to mass migration of people in distress. Recent history demonstrates that this nation can cope with the undeniable logistical difficulties while still complying with the general international standards of *nonrefoulement*, as embodied in § 243(h) of the Immigration and Nationality Act (INA).[1] Never before has this country, no matter how grave the challenges posed by mass migration, adopted a systematic policy of direct return to the country of origin without even elementary screening to identify those who are in genuine danger. For the Court to rule that the Kennebunkport Order[2] complies with domestic and international law would gravely damage a modest but sustained global effort, of which the United States has historically been a leader, to learn from the world's shamefully inadequate responses to Nazi victims—an effort enshrined in domestic and international legal commitments.

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1. 8 U.S.C. § 1253(h) (1988).
2. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

ARGUMENT

I.

RECOGNIZING THAT THIS COUNTRY AND OTHERS RESPONDED WITH SHAMEFUL INADEQUACY TO REFUGEES FROM FASCISM, THE UNITED STATES SINCE WORLD WAR II HAS STRIVEN TO REACT GENEROUSLY, EVEN IN THE CASE OF MASS MIGRATIONS.

Until the 1940s, the United States did not generally distinguish between refugees and immigrants. After World War II, legislation and practice increasingly incorporated that distinction, and the United States since then has granted haven to large numbers of refugees. Their arrivals were sometimes disorderly, their cultures perhaps unfamiliar, but every group did, in time, become integrated into the country, did weave itself into the American tapestry. It is a part of national history in which most Americans take a justifiable pride. But the incorporation of refugee protection into our overall system for admission of aliens has been long in coming, and it has followed an uneven course. Much of the progress reflected lessons learned from the disheartening experience of U.S. policy in the 1930s and 1940s.[3]

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3. For more extensive discussions of the evolution of United States refugee policy, *see, e.g.*, Norman L. Zucker and Naomi Flink Zucker, *The Guarded Gate: The Reality of American Refugee Policy* (1987); Gil Loescher and John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945-Present* (1986); Norman L. Zucker and Naomi Flink Zucker, *From Immigration to Refugee Redefinition: A History of Refugee and Asylum Policy in the United* (continued...)

A. Refugees in Europe, Rejection in America

There have always been, in the United States, strains of prejudice, nativism, and xenophobia. In the first half of this century, those strains were allowed to dominate our immigration policy, resulting in the refusal of the United States to open its doors to refugees from revolution and genocide.

Only in 1875 did Congress pass the first systematic federal restrictions on immigration. Early legislation relied on qualitative screening to keep out the undesirable, such as prostitutes or criminals, but agitation mounted for more rigid restrictions, including numerical ceilings. Restrictionist objectives were finally attained in the 1920s, with the enactment of national origins quotas. The Immigration Act of 1924,[4] more draconian than any previous legislation, set the annual quota for each nation at two percent of the U.S. population descended from that nationality, as determined by the 1890 census. That 34-year-old census was chosen as the base year because at that time few southern and eastern Europeans had come to America. Xenophobia had prevailed.[5]

3.(...continued)
States, in *Refugees and the Asylum Dilemma in the West* 54 (Gil Loescher ed. 1992); Norman L. Zucker and Naomi Flink Zucker, *The 1980 Refugee Act: A 1990 Perspective*, in *Refugee Policy: Canada and the United States* 224 (Howard Adelman ed. 1991); David A. Martin, *The Refugee Act of 1980: Its Past and Future*, in *Transnational Legal Problems of Refugees, 1982 Michigan Yearbook of International Legal Studies* 91.

4. Pub. L. No. 139, 43 Stat. 153 (1924).

5. *See* John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925*, at 300-330; Maldwyn Allen Jones, *American Immigration* 247-77 (1960).

Ironically, as the United States was thus closing its gates more tightly, the plight of refugees in Europe was becoming critical. Refugees were being spawned by the Soviet Revolution and its subsequent counterrevolutions, and Turkish persecution drove out Armenians in search of haven. But it was Adolf Hitler's capture of total power in Germany that impelled the largest flood of refugees—a flood that inspired, in many other countries, not compassion but fear.[6]

The United States responded to the refugee crisis of the 1930s, as did most other countries, by creating barriers to entrance. America would not be invaded by European refugees. Humanitarian considerations could not prevail over the engrained premises of the national-origin quota system. The face of restriction in that era sat solidly on a body of time-honored economic argument and unyielding prejudices.

When there had been an abundance of jobs and a need for labor, immigrants had been welcome. With that era's scarcity of jobs, however, immigrants—and refugees were simply thought of as immigrants—were no longer welcome. America, confronting massive unemployment and social and economic breakdown, was reluctant to share with the stranger.

Economic arguments were reinforced by one-hundred-percent Americanism. Nativism, which had recently triumphed in the quota legislation, remained a vigorous force throughout the Depression and the war years, and was buttressed by anti-Semitism. Many of the refugees were Jews, and anti-Semitism

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6. *See* Michael R. Marrus, *The Unwanted: European Refugees in the Twentieth Century* 51-81, 122-158 (1985).

became a significant factor in opposing refugees, and in the defeat of legislation to admit refugees.[7]

For example, the 1939 Wagner-Rogers bill proposed the admission of twenty thousand German refugee children, under age fourteen, on a nonquota basis over a two-year period. To avoid provoking anti-Semitism, the bill was deliberately termed a *German*, rather than a *Jewish*, refugee children's bill, while the public committee created to support the bill was carefully called the Non-Sectarian Committee for German Refugee Children. It enjoyed a major outpouring of humanitarian support. But the humanitarian outpouring met a wall of nativist resistance. Despite the nonsectarian cast of its title and the restrained modesty of its objectives, most people perceived the bill as intended for the rescue of Jewish children. The refugee-children bill died in committee.[8] One year later, Congress managed to pass a measure to allow the entrance of British children.[9]

Official Washington had followed, or perhaps shaped, public opinion. The Department of State had opposed the children's bill. The Labor Department had waffled, neither supporting nor opposing it. Franklin D. Roosevelt, in the White House, had

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7. *See* David S. Wyman, *The Abandonment of the Jews: America and the Holocaust 1941-1945*, at 6-9 (1984).
8. *See* Barbara McDonald Stewart, *United States Government Policy on Refugees from Nazism: 1933-40*, at 518-47 (1982).
9. *See The Guarded Gate*, *supra* note 3, at 19-21. The measure that passed provides in general terms for the screening and transport of "refugee children," Pub. L. No. 770, 54 Stat. 866 (1940), but the legislative history made clear that the authority would be used for children from Britain endangered by German bombardment. *See* David S. Wyman, *Paper Walls: America and the Refugee Crisis 1938-1941*, at 116-28 (1968).

remained eloquently silent. No less than the Congress, the executive formulated refugee policy. The Congress did so by perpetuating legislative barriers. The executive constructed, in historian David S. Wyman's felicitous term, "paper walls."[10] After the war began, the State Department impeded the intake of refugees by imposing stricter administrative requirements. The department instructed its overseas processing staff to withhold visas from anyone about whom they had "any doubt whatsoever." A circular telegram amplified the new policy:

> [A]lthough a drastic reduction in the number of quota and nonquota immigration visas issued will result therefrom and quotas against which there is a heavy demand will be underissued, it is essential to take every precaution at this time to safeguard the best interests of the United States.[11]

The paper walls, under Assistant Secretary Breckenridge Long, grew insurmountable. In a memorandum, he spelled out his modus operandi:

> We can delay and effectively stop for a temporary period of indefinite length the number of immigrants into the United States. We could do this by simply advising our consuls to put every obstacle in the way and to require additional evidence and to resort to various administrative advices which would postpone and postpone and postpone the granting of the visas.[12]

10. *Id.*
11. *Id.* at 174.
12. *Id.* at 173.

Long's insistence on calling the harassed people fleeing for their lives *immigrants* rather than *refugees* cloaked a harsh policy in a facade of reasonableness.

To a large extent, administrative reluctance to admit refugees reflected an unwillingness to recognize that for the refugees future dangers were quite real. In a well-known and tragic incident in 1939, the *SS St. Louis* sailed from Hamburg with hundreds of passengers seeking escape from Germany. Denied permission to discharge its human cargo at its original destination in Cuba, the ship proceeded to the Florida coast. An American Coast Guard cutter patrolled the waters there to prevent anyone on the refugee ship from trying to reach shore.[13] The desperate passengers sent a wire to President Roosevelt, but he did not respond. The State Department, fearing that a precedent would be set, ruled that no one without a proper visa could land; none of the passengers had visas valid for the United States. The *St. Louis* ultimately returned to Europe, where some of its passengers eventually became part of Hitler's "final solution."[14] Even in this stunning failure of American compassion, however, the United States government did not forcibly return the rejected asylum seekers directly to the government they had so recently escaped.

The will of the United States to admit refugees had been tested, and we had failed the test. Fear, prejudice, indifference, inertia, economic distress had, in the end, formed a wall, a wall that even the highest government officials had no desire to breach.

13. Stewart, *supra* note 8, at 442.
14. For the story of the *SS St. Louis*, *see* Gordon Thomas and Max Morgan Witts, *Voyage of the Damned* (1974).

B. After World War II: Learning Some of the Lessons

Revulsion at the full scope of Nazi persecution, fully revealed upon the defeat of the Axis powers, started this country on a long, uneven effort to build a better legal structure that might guarantee responsiveness to future refugee needs. President Harry S. Truman initiated this evolution. With the surrender of Hitler's military, Truman was faced with an old phenomenon under a new name -- displaced persons (DPs). Responding to their misery, he issued a presidential directive that eased their immigration under existing quotas.[15] But the directive could cover only a small number of DPs, and Truman asked Congress, for humanitarian and foreign policy reasons, to enact DP legislation. The Displaced Persons Act of 1948 was the first significant refugee legislation in American history.[16] Amended in 1950 and extended in 1951, it made possible the admission of more than four hundred thousand refugees.[17] Though the numbers of needy people displaced in Europe in the wake of global war might have appeared overwhelming, America did not shrink from a major resettlement effort.

C. Refugees from European Communism

The pressures—guilt and humanitarianism—that eased the admission of the DPs were soon supplemented by other concerns, as Communist expansionism gave refugees strategic importance. Refugee-escapees who "voted with their feet" against Communism were seen to offer proof of the inadequacies of the

15. *Reprinted in* 13 Dept. of State Bull. 981 (1945). *See* Loescher and Scanlan, *supra* note 3, at 5-6.
16. Pub. L. No. 774, 62 Stat. 1009.
17. *From Immigration to Refugee Redefinition*, *supra* note 3, at 57-58.

Communist system and the strength of democracy. Both the Truman and Eisenhower administrations encouraged refugees to come to the United States. Congress also was committed to encouraging escape from Communism, even to the extent of abandoning established numerical limits and quotas and allocating funds for escapee assistance.[18]

The Refugee Relief Act (RRA) of 1953, Pub. L. No. 203, 67 Stat. 400, relaxed United States immigration law. Congress ignored the long-established national quotas and instead authorized the issuance of over 200,000 nonquota visas for persons escaping from Iron Curtain countries -- something it had been unwilling to do for 20,000 children just 14 years earlier. In 1956 the President authorized the first mass parole of refugees into the United States. That year, just before the expiration of the RRA, Soviet troops crushed an anti-Communist revolt in Hungary, sending thousands of Hungarians into neighboring Austria. Some were given visas under the RRA; others, however, at President Eisenhower's direction, were admitted under the theretofore obscure parole power of the Attorney General.[19] President Eisenhower authorized their admission to the United

18. *See* Congressional Research Service, 96th Cong., 2d Sess., *Review of U.S. Resettlement Programs and Policies* 7-11 (Comm. Print, Sen. Comm. on the Judiciary, 1980).
19. The parole power, long an administrative practice, was given statutory sanction in § 212(d)(5) of the Immigration and Nationality Act (INA), now codified at 8 U.S.C. § 1182(d)(5) (1988). On the evolution of the parole power, its use for refugee programs, and the controversy over that use, *see* Thomas Alexander Aleinikoff and David A. Martin, *Immigration: Process and Policy* 347-52, 709-10 (2d ed. 1991).

States, and the American public mustered a warm welcome for over thirty thousand Hungarian "freedom fighters."[20]

The Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639, which admitted still more Hungarians, significantly defined refugee-escapees as victims of racial, religious, or political persecution who were fleeing Communist or Communist-dominated countries, or a country in the Middle East. This ideologically and geographically limited definition, perpetuated in the 1965 amendments to the INA,[21] would stand until the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, replaced it with a more neutral definition based on the UN Convention and Protocol relating to the Status of Refugees.[22]

But even under the Refugee Act, the number of refugees admitted to the United States from the Soviet bloc remained large. In the 1970s, when Soviet emigration policy softened, in apparent keeping with the progress of U.S.-Soviet détente, the United States stepped up its resettlement program for those finally able to leave, most of whom were Soviet Jews. The number of Soviet refugees admitted yearly has varied largely according to Kremlin decisions. From a high exceeding 50,000 in 1979, the total declined to 640 in 1984, but attained 50,000

20. *Id.* at 709.
21. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (amending former section 203(a)(7) of the INA).
22. Convention relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 137, *as modified by* the Protocol relating to the Status of Refugees, done Jan. 31, 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223, T.I.A.S. No. 6577.

again in 1990. Between 1975 and the end of 1991, over a quarter of a million Soviet citizens resettled in the United States. And now, even with the end of the Soviet Union, the United States does not shrink from assisting a remarkably large-scale ongoing migration. In fiscal year 1992, the number to be admitted was set at 61,000, and actual admissions apparently came close to that figure. For FY 1993, the United States has announced a willingness to admit 50,000 nationals of the former Soviet Union.[23]

D. Cuban Refugees: The United States Joins the Ranks of First Asylum Countries

When Fidel Castro came to power in Cuba in 1959, the United States again found ways to welcome refugees. It became, in the process, a country of first asylum. Over the years, America would receive at least 900,000 Cubans, but even when the Mariel boatlift of 1980 greatly strained America's receptiveness, this country never adopted a policy of interdiction, much less of unscreened returns. Indeed, to this day the United States policy remains decidedly open to potentially uncontrolled numbers of arrivals from Cuba, who are now readily granted asylum and legal protection.

From the early days of the Castro revolution until the break in diplomatic relations in January 1961, Cubans moved directly to the North American mainland, initially as the beneficiaries of

23. U.S. Department of State, Office of the U.S. Coordinator for Refugee Affairs, *Proposed Refugee Admissions for Fiscal Year 1993* (Washington, D.C., June 1992), at 18; Presidential Determination No. 93-1, 57 Fed. Reg. 47,253 (Oct. 2, 1992) (setting refugee admission numbers for FY 1993).

an extraordinarily liberal nonimmigrant visa policy at the U.S. consulate in Havana. Once here they benefited from a variety of administrative measures that gave them an indefinite stay—in effect, automatic political asylum. These policies persisted even though arrivals, sometimes reaching 1500 per week, greatly strained the facilities for reception and assistance in south Florida.[24] As in other refugee situations this nation has faced, the reception and resettlement process posed difficult challenges, but federal and state governments found ways to cope. Eventually Congress passed the Migration and Refugee Assistance Act of 1962,[25] still in effect, to establish a more solid foundation for continued assistance.

Castro's suspension of air travel in response to the 1962 Cuban missile crisis brought a relative lull in Cuban migration to the United States, after perhaps a quarter million Cubans had left.[26] But in late 1965, responding to new signals from Havana, President Johnson announced a major new initiative. At the signing of the historic 1965 amendments to the Immigration and Nationality Act, in a ceremony held at the Statue of Liberty, he proclaimed the start of a massive new refugee parole program, the Cuban freedom flights,[27] a program that brought 270,000 Cubans directly to the United States before its termination in 1973. Another 70,000 came in from Spain under a separate parole program.

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24. *See* Loescher and Scanlan, *supra* note 3, at 61-75.
25. Pub. L. No. 87-510, 76 Stat. 121 (codified, as amended, at 22 U.S.C. §§ 2601-2606 (1988)).
26. Loescher and Scanlan, *supra* note 3, at 70-71.
27. *See* 1 *Weekly Comp. of Pres. Doc.* 364-67 (Oct. 3, 1965); *id.* at 470-74 (Nov. 15, 1965).

Under President Carter, relations with the Castro government warmed somewhat, and consideration of new refugee programs became possible. Neither side sought to restore the freedom flights, but a special parole program brought some 10,000 former political prisoners and family members to this country.

In 1980, the United States encountered the most chaotic and difficult episode in its history of receiving Cuban refugees: the Mariel boatlift. The crisis began when over 10,000 Cubans rushed in to the Peruvian embassy in Havana seeking diplomatic asylum. Their plight gained widespread attention and sympathy throughout the hemisphere. Seeking to undo this political setback, Fidel Castro launched a diversion. He announced that the port of Mariel on Cuba's north shore would be open for Cuban exiles to come and pick up relatives who wanted to leave the island. Because the cut-off of the freedom flights had left numerous families separated, this invitation attracted thousands of boats south from Florida. When they arrived, some relatives were allowed to board, but the Cuban government added an especially cynical exploitation of the family members who had sent the boats southward. It took the occasion to force aboard the vessels in Mariel thousands of other persons not sought by the captains, including many who had been convicted of common crimes, escorted to the port directly from jails and prisons, and others from mental health facilities.[28]

Before the Carter Administration implemented policies to stop the southbound boat flow, enough vessels had reached Mariel to bring 125,000 Cubans eventually to Florida, over the course of a few months in mid-1980. Their arrival coincided with

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28. *See The Guarded Gate*, *supra* note 3, at 58-71.

the peak of a more modest boat flow from Haiti that had been picking up momentum over the previous few years. Scrambling to respond, the U.S. government established a special Cuban-Haitian task force and employed military bases at several locations throughout the United States (many of which had been used for the emergency Vietnamese resettlement five years earlier) as initial centers to house and care for the arrivals and to perform the necessary processing. Those arriving were granted a special parole status (known as Cuban-Haitian entrant), and eventually Congress passed legislation permitting their adjustment to lawful permanent resident status.[29]

The Mariel experience was especially traumatic for this country. The arrival was massive and sudden, it came in the midst of a hotly contested presidential election campaign, and the percentage of Marielitos with criminal backgrounds made camp management and eventual placement especially difficult. It is quite likely that this bitter experience contributed to the Bush Administration's resolve to issue the Kennebunkport Order in May 1992 returning all Haitian boat passengers directly to Haiti.

But a different lesson should be drawn. The 1991-92 Haitian movement shares few similarities with Mariel. The flow from Haiti is spontaneous, coming in Haitian boats; there has been no manipulation of U.S.-based family members urging them to send American vessels for rescue. As a result, there is no opportunity

29. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 202, 100 Stat. 3359. A brief summary of the Cuban-Haitian entrant program and related legal developments appears in Aleinikoff & Martin, *supra* note 19, at 412-13, 436-37. *See also* Ronald Copeland, *The Cuban Boatlift of 1980: Strategies in Federal Crisis Management*, 467 *The Annals* 138 (1983).

for an adversary government to send convicted criminals to this country. And the unprecedented outpouring of support in this hemisphere for restoration of the democratically elected Aristide government[30] opens prospects for medium-term resolution of the crisis through political and diplomatic means that were not remotely possible with regard to Cuba in 1980. Although any large-scale movement entails considerable logistical problems, which *amicus* does not minimize, Mariel certainly proved that the United States government is capable of responding even in highly unfavorable circumstances.

E. Cubans and Haitians: Radically Unequal Treatment

Whatever may have been the appropriate lessons of Mariel, it is undeniable that the U.S. government since then has applied any negative teachings to Haitians, while maintaining to this day a policy of near-automatic asylum for those Cubans who manage to leave the island. While Haitians were hindered, deterred and often subjected to discriminatory treatment, Cubans have been almost uniformly welcomed. With the introduction of the Haitian Migrant Interdiction Program in 1981, the disparity in treatment

30. The Meeting of Ministers of Foreign Affairs of the Organization of American States, convening shortly after the Haitian coup, adopted unprecedentedly interventionist resolutions calling for restoration of the democratically elected government and imposing a hemispheric embargo. *See* OEA/Ser.F/V.1, MRE/RES. 1/91 corr. 1 (3 Oct. 1991) and OEA/Ser.F/V.1, MRE/RES. 2/91 (8 Oct. 1991). The Executive Order implementing the embargo for the United States was Exec. Order 12,779, 56 Fed. Reg. 55,975 (Oct. 28, 1991). *See generally* Pamela Constable, *Dateline Haiti: Caribbean Stalemate*, 89 Foreign Policy 175 (1992-93).

widened to a chasm.[31] The Reagan Administration often justified the difference based on the "foreign policy aspects" of the migrations. The Cubans, it was said, had been forced out by a totalitarian and unfriendly government. The Haitians, on the other hand, came by choice from a country whose "friendly government [that of Jean-Claude Duvalier] is interested in enforcing its laws and wishes to cooperate with the United States in bringing illegal migration under control . . . ."[32] This policy, at best, skirted the edges of U.S. law, ignoring the Refugee Act's promise of asylum to all who met a nonideological standard meant for evenhanded application. But the early versions of the interdiction program at least allowed for some screening, aboard the Coast Guard cutters, of possible refugee claims (however inadequate such screening may have been). With the Kennebunkport Order, any attempt to honor the requirements of U.S. and international law through pre-return screening was abruptly halted.

The treatment of Cubans stands in stunning contrast. Although the Cuban government now polices against illicit departures, Cubans continue to escape the country on boats, rafts and other makeshift vessels. In recent years, many of those craft have first been spotted by a group of volunteer pilots who regularly patrol the skies over the Florida straits; when a boat is sighted, the Coast Guard is notified. It is cruelly ironic that most

31. *See* Lawyers Comm. for Human Rights, *Refugee Refoulement: The Forced Return of Haitians Under the U.S.-Haitian Interdiction Agreement* (1990).

32. *The United States as a Country of Mass First Asylum: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Sen. Comm. on the Judiciary*, 97th Cong., 1st Sess. 3 (1981) (testimony of Thomas O. Enders, Assistant Sec'y of State).

of the 2,205 Cuban refugees who arrived in the United States and received legal status this past year (the highest total since 1980) had been rescued at sea by U.S. Coast Guard vessels, the same Coast Guard that patrols the waters around Haiti to seek out and return any escaping Haitians.[33]

F. Southeast Asians: An Ongoing Legacy of the Vietnam War

It may have been a quiet guilt about the loss of the war in Vietnam that prompted the largest and most sustained U.S. program in response to a mass migration: the effort to resettle Southeast Asian refugees. In the spring of 1975 the Saigon government disintegrated as Vietcong and North Vietnamese troops advanced, and a chaotic exodus ensued. There was no thought in U.S. government circles of containing the exodus or forcing return, though the disorderly migration posed enormous problems. Instead, President Ford promptly created a special interagency task force for the evacuation and resettlement of Indochinese refugees. In a brief period in 1975, some 135,000 were evacuated and screened on Guam and Wake Island, and processed through reception centers (mostly underused military bases) in the United States. By the end of that year, the temporary refugee relocation camps had been closed, the outflow

33. *See Refugee Reports*, October 30, 1992, at 15. The government has often justified its blanket policy of accepting arriving Cubans by pointing to the Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161, as amended, 8 U.S.C. § 1255 note (1988). But that Act does not *mandate* legal status for arriving Cubans; it merely authorizes the adjustment of status to lawful permanent resident one year after admission or parole, *in the discretion of the Attorney General*.

was down to a trickle, and it appeared that the Southeast Asian refugee problem would fade from the national consciousness.[34]

But the agony of Southeast Asia was not over. By late 1977, the press was beginning to speak of a new phenomenon, the so-called "boat people" from Vietnam. These exiles endured great risks and privation on the high seas in an effort to escape, but were increasingly rebuffed by passing ships and resisted by potential haven states in the region. Rising numbers of people also were heading for Thailand overland, not only from Vietnam but also from Laos and Cambodia. The American response was not to despair of coping with the problem or to seek to bottle people up inside their homelands. Instead the U.S. government led efforts to assure immediate reception by the first-asylum states in the region and to condemn those instances where receiving states pushed off boats or forced land refugees back across the border.[35]

In 1978 much larger vessels, including the *Southern Cross*, *Tung An*, *Huey Fong*, and *Hai Hong*, each bearing hundreds or thousands of refugees, appeared in the South China Sea. They marked the undeniable beginning of a new and massive outmigration, sometimes exceeding 50,000 per month. The United States took the lead in pressing first-asylum states to allow entry and other nations to accept distant resettlement. The high point of U.S. leadership may have been the Carter Administration's surprise offer at a 1979 conference of up to 14,000 resettlement spaces per month.[36] It was not easy for the government to provide the overseas processing, transportation,

34. *See* Loescher & Scanlan, *supra* note 3, at 102-19.
35. *Id.* at 120-46.
36. *See id.* at 137-46.

and support upon arrival needed to deliver on this promise. But the effort went forward, eventually calling into existence a new office, the U.S. Coordinator for Refugee Affairs, and new domestic resettlement and support arrangements embodied in title III of the Refugee Act of 1980.[37]

Although the Indochinese exodus is now winding down, difficult issues continued into the 1990s. A particular focus was Hong Kong, which began in the late 1980s to receive, on its limited land mass, a major new flow of Vietnamese boats, carrying tens of thousands of asylum seekers. Ultimately, an international conference convened by the UN High Commissioner for Refugees (UNHCR), with active involvement by the United States, developed what is known as the Comprehensive Plan of Action.[38] It provides for screening of all arrivals throughout the region according to established legal standards. Those found to satisfy the "well-founded fear of persecution" test of the UN Convention are eligible for onward resettlement. Blocking resettlement for those who fall short is meant to discourage future unauthorized arrivals. Meantime an in-country option is available in Vietnam; those who believe that they are at risk can apply within the country for the Orderly Departure Program. Nothing in the Comprehensive Plan remotely contemplates seaborne interdiction followed by direct return. In fact, the U.S. government has even insisted that the British government (Hong Kong is a British dependency) should not return to Vietnam those *screened out*, though our diplomats have not suggested that this group should have been found to meet the international refugee

37. INA §§ 411-414, 8 U.S.C. §§ 1521-24 (1988).
38. The Comprehensive Plan of Action is reprinted in 1 Int'l J. Refugee Law 574 (1989).

definition. The U.S. government has not insisted upon the full protections of asylum nor access to onward resettlement for this group, but it has adamantly resisted any plan for involuntary return.[39]

G. Central American Refugees: Eventual Safe Haven for Some

This country's treatment of refugees from Central America over the past decade has been highly controversial. But even in this sensitive policy realm, the political branches have demonstrated that the prospect of massive numbers need not prevent the application of legal guarantees, sometimes highly generous and protective ones. Until one year ago, El Salvador was in the throes of a protracted and bloody civil war, marked by significant human rights abuses. Thousands of Salvadorans had migrated north in response. After years of debate over the subject, Congress finally decided in 1990 to provide new safe-haven protection, known as temporary protected status (TPS), under INA § 244A, 8 U.S.C. § 1254a (Supp. III 1991), to Salvadorans who were in this country as of Sept. 19, 1990. Immigration Act of 1990 § 303, 8 U.S.C. § 1254a note (Supp. III 1991). This enactment provided Salvadorans with work authorization and protection against deportation for 18 months. Congress voted this benefit even though estimates of the numbers of Salvadorans illegally in this country ran as high as 500,000.[40]

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39. *See* Aleinikoff & Martin, *supra* note 19, at 728-30.
40. *See, e.g.*, Sen. Alan K. Simpson, *We Can't Allow All Salvadorans to Stay*, Wash. Post, July 10, 1984, at A13. In the end, approximately 200,000 Salvadorans were granted TPS. *U.S. Will Defer Departure of Salvadorans, but Will Not Extend TPS*, 69 *Interpreter Releases* 600 (1992).

Upon the expiration of the statutory TPS period, President Bush decided to grant similar benefits for an additional year under the functionally similar rubric of "deferred enforced departure," in order to avoid disrupting the ongoing efforts to establish a stable peace in El Salvador.[41]

Guatemala also has been suffering from a prolonged civil war, accompanied by widespread human rights abuses. Although neither Congress nor the executive branch has seen fit to extend TPS to Guatemalans, the Department of Justice did voluntarily include extensive procedural rights for Guatemalans in a comprehensive settlement of a class-action lawsuit challenging previous asylum processing.[42] This settlement covered both Salvadorans and Guatemalans, and it gave virtually all such persons in the United States before a stated cut-off date the right to have their asylum claims heard or reheard de novo by a newly created corps of asylum officers established by regulations issued in July 1990.[43] The kind of screening implicitly required by the court of appeals in this case before anyone may be returned to Haiti is surely no more burdensome in character than the program extended with the Justice Department's consent to approximately 42,600 Guatemalans.[44]

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41. *See id.*
42. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).
43. 55 Fed. Reg. 30,674 (1990) (principally codified in 8 C.F.R. part 208 (1992)).
44. *See March 31 Asylum Deadline Approaches for ABC Guatemalans*, 69 *Interpreter Releases* 348 (1992). The Salvadoran beneficiaries of the settlement consisted primarily of those eligible for TPS.

II.

EVEN IN PERIODS WHEN THE UNITED STATES HAS BEEN INVOLVED IN RESPONDING TO MASS MIGRATIONS, IT HAS PAID CAREFUL ATTENTION TO STRENGTHENING THE LEGAL GUARANTEES FOR REFUGEES.

The account presented here reveals numerous instances where the United States has implemented a lesson of generosity or simple humanitarian responsiveness learned from the failures of refugee policy in the 1930s and 1940s. Significantly, throughout the postwar period this country has also moved to strengthen legal guarantees—even at the times when massive movements might have been thought most likely to induce reluctance about undertaking commitments of that sort.

The United States played a significant role in the negotiation and shaping of the 1951 Convention relating to the Status of Refugees. Drafted while Europe was still suffering the lingering effects of World War II, and while the United States was resettling 400,000 people under the Displaced Persons Act, this instrument nonetheless was explicitly designed to provide firm legal guarantees for Europe's displaced.[45] The daunting scope of the problem did not bring the process of legal protection to a halt. Disappointingly, after its early activism, the United States did not become a party to the Convention, but this failure might be attributed largely to independent domestic controversies in the 1950s over the Bricker Amendment, which threatened

45. *See generally* 1 Louise Holborn, *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner of Refugees* 153-73 (1975).

considerable retrenchment of U.S. treaty powers.[46] Nonetheless, the United States continued to voice support for the treaty's standards, and it retained an active role in the UNHCR executive committee.

In 1968, the United States finally ended its standoffish posture toward the international refugee treaties, by acceding to the UN Protocol. Although this occurred during a high point of the freedom flights bringing Cubans directly to the United States—clearly manifesting our potential as a first asylum country—President Johnson emphasized in his letter of transmittal sending the treaty to the Senate: "Foremost among the humanitarian rights which the Protocol provides is the prohibition against expulsion or return of refugees to any country in which they would face persecution."[47] The Senate readily approved the treaty.[48]

Twelve years later, in the Refugee Act of 1980,[49] the United States completely recast its domestic legal structure governing both overseas admissions and political asylum. This too was no fair-weather document built on assumptions that

46. *See generally* Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 *Human Rights Q.* 309, 310-12 (1988).

47. *Message from the President of the United States transmitting the Protocol Relating to the Status of Refugees, Done at New York on January 31, 1967*, Exec. K, 90th Cong., 2d Sess., at iii (1968).

48. *See Protocol Relating to Refugees*, Exec. Rept. No. 14, 90th Cong., 2d Sess. (1968) (Committee report and hearing transcript considering the Protocol).

49. Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8, 22 U.S.C.).

refugee situations would be easily managed. Instead, most of the drafting and legislative work occurred during 1979, precisely the period when the outflow from Indochina was at its chaotic peak. Despite this situation, Congress explicitly decided to change INA § 243(h) from a discretionary to a mandatory provision, in order to bring it into line with the *nonrefoulement* guarantee of Article 33 of the UN Convention.[50]

III.

THE HISTORY OF U.S. RESPONSE TO MASS REFUGEE MIGRATIONS SINCE WORLD WAR II REVEALS THAT THE LEGAL GUARANTEES ENFORCED BY THE COURT OF APPEALS ARE ENTIRELY CONSISTENT WITH REALISM ABOUT SUCH MOVEMENTS.

The foregoing history places the May order interdicting Haitian asylum seekers in a revealing light. This is by no means the first time that the United States has been challenged to deal with potentially chaotic human migrations from countries marked by turmoil and human rights abuses. The government has consistently found ways to cope humanely with the arrival of tens of thousands of refugees and asylum seekers. Most of the 900,000 Cubans resettled since Castro's revolution have come directly from that island; though the process was sometimes messy and difficult, the challenge did not overwhelm U.S. responsiveness. When Saigon fell in 1975, American ingenuity found ways to move large numbers to Guam and Wake Island,

50. *See* H.R. Rep. No. 96-781, 96th Cong., 2d Sess., at 20 (Conference Report on the Refugee Act of 1980); Martin, *supra* note 3, at 101, 109-10.

eventually resettling over 135,000 who had fled in the space of just a few weeks. In the midst of these crises, the United States has steadily continued an ongoing process of strengthening legal protections for refugees; its role has been realistic but constructive. Only with the Kennebunkport Order has it departed so dramatically from the hard-won heritage of the last 45 years.

Amici do not minimize the dilemmas created by the sudden and unplanned appearance of large numbers of asylum seekers. But affirmance of the judgment of the court of appeals would leave the United States with numerous options for dealing with such situations. It would foreclose but one path—the return of asylum seekers, without any attention to the nature of their claims to refuge, directly to the authorities of the country where they risk persecution. This path, as the court of appeals concluded, and as the respondents and other *amici* have demonstrated, was deliberately closed by the decision of Congress, embodied in INA § 243(h), 8 U.S.C. § 1253(h) (1988), acting to honor the painstakingly won advance of refugee protections since World War II.

CONCLUSION

For the foregoing reasons, *amici* American Jewish Committee and Anti-Defamation League urge that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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